IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO Nos. 44, 45, 162 & 163 of 2003.

Date of Decision: 6.3.2006.

1.FAO No. 44/03

Smt. Kiran Bala & ors. …Appellants

Versus.

Smt Nirodh Kumari & ors. .. Respondents.

2.FAO No. 45/03

Smt. Kiran Bala & ors. …Appellants

Versus.

Smt Nirodh Kumari & ors. .. Respondents.

3.FAO No. 162/03

Oriental Insurance Co. Ltd. …Appellant

Versus.

Smt Kiran Bala & ors. .. Respondents.

4.FAO No. 163/03

Oriental Insurance Co. Ltd. …Appellant

Versus.

Smt Kiran Bala & ors. .. Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Appellant(s): **Mr. Suneet Goel, Advocate, for appellants in FAOs No. 44 & 45/03 and Mr. Ashwani Sharma, Advocate, for respondent No.3 in FAOs No.44 & 45/03.**

For the Respondent(s): **Mr. Ashwani Sharma, Advocate, for the appellant in FAOs No.162 & 163 of 2003 and Mr. Sunit Goel, Advocate, for Respondents in FAOs No.162 & 163/03.**

Deepak Gupta, J. (Oral).

By this common judgment, four appeals being FAO No.44 of 2003, FAO No.45 of 2003, FAO No.162 of 2003 and FAO No.163 of 2003 are disposed of as they arise out of the same accident and common award.

Claimant Kiran Bala along with her sons Sanjay Sharma, Ajay Sharma and Manoj Kumar filed two claim petitions relating to the death of her husband Joginder and her father-in-law Pola Ram. In these claim petitions it was alleged by Smt Kiran Bala that she along with both the deceased i.e. her husband Joginder and father-in-law Pola Ram along with one Bidhi Chand were returning from Baba Balak Nath Temple to Dharampur in Taxi No. HP-02-4618, which was owned by Smt. Nirdhosh Kumari and was insured with the Oriental Insurance Company. It is alleged that the taxi was being driven by Ashok Kumar and that due to his rash and negligent driving, the taxi went off the road and fell into the khud. Joginder and Pola Ram died as a result of the injuries sustained in the accident.

The owner and the alleged driver Ashok Kumar did not put in appearance in the Court. The Insurance Company contested the claim petition and one of the main grounds taken was that the vehicle in question was being driven by one of the deceased i.e. Joginder. The

parties led evidence and the learned Tribunal has awarded compensation to the claimants.

As far as the petition relating to the death of Joginder is concerned, the learned Tribunal has awarded compensation of Rs. 2,94,400/- along with costs and interest @9% per annum. As far as the petition filed on behalf of Pola Ram is concerned, a sum of Rs.96,000/- was awarded along with costs and interest. The Insurance Company was held liable to pay the compensation.

Two appeals being FAO Nos. 44 and 45 of 2003 have been filed by the claimants claiming enhancement of compensation and FAO Nos. 162 and 163 of 2003 have been filed by the Insurance Company challenging the award of the learned Tribunal.

It would be pertinent to mention that the Insurance Company has obtained permission under Section 170 of the Motor Vehicles Act to contest the petitions on all grounds and hence the Insurance Company is entitled to challenge the award on all grounds.

The first question which arises for consideration is that as to who was driving the vehicle in question. Claimant Kiran Bala appeared as her own witness and has expressly and clearly stated that the vehicle was being driven by Ashok Kumar. She has denied the suggestion that the vehicle was being driven by the deceased Joginder and reiterated her assertion that the vehicle was driven by Ashok Kumar. PW4 Bidhi Chand has also stated that the vehicle in question

was being driven by Ashok Kumar. He was one of the passengers in the taxi. The entire case of the Insurance Company is based upon the claim form filed by the owner of the taxi Nirdhosh Kumari while claiming compensation. In this claim form Ex.R2, it has been stated that Joginder driver died on the spot. This claim form has been placed and proved on record by RW1 Jeet Ram Negi. According to him, the compensation was paid to Kiran Bala on the basis of this claim form. To the similar effect is the statement of Vinod Bhardwaj who states that he had inquired from Vinod Kumar respondent who had informed him that the vehicle was being driven by Joginder. In fact the statement of this witness is hearsay and cannot be read in evidence. Moreover, there is no such respondent by the name Vinod Kumar in this case. Therefore, no reliance can be place on the statement of RW2. In fact, the Insurance Company should have summoned the owner and driver of the vehicle. Efforts in this behalf were made by the Insurance Company and an application was filed by the Insurance Company on 1.10.2002 for permitting it to summon Nirdosh Kumari and Ashok Kumar. This application was rejected by the Tribunal.

From a perusal of the zimni orders, I find that the issues in the case were framed by the learned Tribunal on 19.9.2001. Four witnesses of the petitioner were examined on 1.11.2001 and the case was adjourned to 7.12.2001 for remaining evidence of the petitioner.

The evidence of the petitioner was closed on 9.1.2002 and the case was then fixed for evidence on behalf of the Insurance Company which was the sole contesting respondent on 26.2.2002. On 26.2.2002 no RW was present and the case was adjourned at the request of the Insurance Company for 30.3.2002. On 30.3.2002, none appeared on behalf of the Insurance Company and it was proceeded ex-parte. This ex-parte order was set aside on 8.4.2002 and the case was listed on 13.5.2002. On 13.5.2002 also initially none appeared on behalf of the Insurance Company and it was again proceeded ex-parte. However, later on the counsel for the Insurance Company appeared and the ex-parte order was set aside. No evidence was produced and the case was adjourned for 1.6.2002. On the said date also neither any list of witnesses was filed nor any steps for summoning the witnesses were taken and the case was adjourned to 12.7.2002 for evidence of the Insurance Company. On 12.7.2002 neither RWs were present nor any steps were taken and the case was adjourned to 2.8.2002. No evidence was present and at the request of the Insurance Company the case was adjourned to 21.8.2002. On 19.9.2002 again no evidence was present and an application was filed to consolidate the two cases. This application was rejected and a request was made to produce the Surveyor and Manager of the Insurance Company which request was allowed and the case was adjourned to 1.10.2002. On 1.10.2002 the statements of the two witnesses were recorded and at this stage an

application to summon Nirdosh Kumari and Ashok Kumar was rejected. More than nine opportunities were granted to the Insurance Company to lead evidence. In my opinion, the learned Tribunal has rightly rejected the application which was filed at a highly belated stage. From the evidence on record there is nothing on record to show that it was Ashok Kumar who was driving the taxi in question and hence the finding of the learned Tribunal in this regard is upheld.

With regard to quantum, in the case relating to the death of Joginder i.e. MAC petition No. 70 of 1999, the evidence led shows that the deceased was employed as driver in the HRTC who was aged about 54 years. He was survived by his wife and three major sons. The learned Tribunal has taken the income of the deceased at Rs.3500/- per month and assessed the monthly dependency of the family at Rs.2300/- per month or Rs. 2,76,00/- per annum. Applying the multiplier of 10, the compensation of Rs.2,76,000/- has been awarded.. A sum of Rs.5000/- for loss of consortium, Rs.3000/- as conventional damages and Rs.10000/- for the injuries have been awarded in favour of the claimant by the Tribunal. The Tribunal should not have awarded Rs. 10000/- for injuries to the claimant Kiran Bala since there was no claim in this behalf. However, I find that Rs.5000/- awarded on account of loss of consortium is on the lower side and no amount has been awarded for funeral expenses etc. and therefore, I increase the amount for loss of consortium to Rs.10,000/-.

The claimants are also awarded Rs.8000/- for conventional damages and funeral expenses. The learned Tribunal has awarded a total compensation of Rs.2,94,000/- which is just and reasonable and calls for no interference.

As far as the claim of deceased Pola Ram is concerned, he was 70 years old at the time of the accident. He was alleged to be a shopkeeper having income of Rs.6000/- per month. However, no evidence was led that the deceased was earning Rs.6000/- per month or that he was in fact running a shop except for the bald statement of Kiran Bala. On the basis of the statement of Kiran Bala, the learned Tribunal has awarded Rs.96000/- by taking the income of the deceased at Rs.6000/- per month and assessing the loss of dependency of the family at Rs.4000/- per month and by applying the multiplier of 2. In my view, the income assessed is very much on the higher side. Without there being any proof of income that the deceased was earning Rs.6000/- per month by running his shop, the income of the deceased could not have been taken at Rs.6000/- per month. However, the multiplier of 2 used is very low. The compensation of Rs.96,000/- awarded by the Tribunal is just and reasonable and calls for no interference. However, it is clarified that in both the claim petitions the claimants shall be entitled to interest @ 9% per annum from the date of filing of filing of the claim petition till payment/deposit of the amount.

Mr. Suneet Goel, contended that the learned Tribunal has not awarded any amount to Manoj Kumar son of Joginder who was also one of the claimants. The Tribunal has not given any reason for not awarding any amount to Manoj Kumar. I also find that the apportionment made is not proper since all the sons are major. Therefore, the award in claim petition No.70 of 1999 relating to the death of Joginder is modified and re-apportioned as follows:-

1. Smt. Kiran Bala (widow)	Rs. 2,01,000/-
2. Sanjay Sharma	Rs.31,000/-
3. Ajay Sharma	Rs.31,000/-
4. Manoj Kumar	Rs.31,000/-

Similarly in MAC Petition No. 71 of 1999, the total amount shall be shared equally by all the four claimants, i.e. Rs.24,000/- each.

All t he four appeals are disposed of in the aforesaid terms. No costs.

March 6, 2006. (Deepak Gupta), J.
s.